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NV Multi Corp Bhd & Ors v Suruhanjaya Syarikat Malaysia

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(F)-15 OF 2008(W)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASHIM YUSOFF AND JAMES FOONG FCJJ
8 JUNE 2010

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Companies and Corporations — Consumer protection — Offer to purchase 'interest' in company — Public offer of rights over burial plots and urn compartments by appellants — Whether purchasers obtained 'interest' or mere rights to use compartments — Whether appellants' business fell within meaning of 'interest' under s 84 of the Companies Act 1965 — Companies Act 1965 s 84

D

Companies and Corporations — Purchase of business — Offer to public to purchase 'interest' in company — Plaintiff offered for sale burial plots to public — No profit available for purchasers to participate — Whether a common enterprise — Mere right of use of facilities, whether amounted to participation in assets of appellants — Whether appellants' business amounted to public offer for sale of 'interest' in the company — Companies Act 1965 s 84

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Words and Phrases — 'Interest' — Companies Act 1965 s 84

The plaintiffs were involved in the business of providing burial lots and compartments for storage of urns containing ashes of the cremated on memorial parks developed by the plaintiffs. To acquire a burial lot or an urn compartment in these parks, purchasers had to execute a standard form of contract to purchase a licence for the burial plot or urn compartment. The vendor or its appointed trustee would have to maintain the plot and the entire development. After the parks had been fully developed the vendor will transfer the same including the burial plots to its trustee to be held for all the purchasers in common. The purchasers could transfer their rights to their respective burial plots provided that at the time of transfer no interment shall have been effected on the plot. Similar conditions applied to the columbarium for the storage of urns. Section 91(1) of the Companies Act 1965 ('the Act') provides that a person shall not issue or offer to the public for subscription or purchase or invite the public to subscribe for or purchase any interest unless at the time of the issue, offer or invitation, there is an approved deed in force in relation to the interest. Uncertain whether the requirements of the Act were applicable to them, the plaintiffs applied to the High Court for: (i) a declaration that the plaintiffs' business was not within the meaning of 'interest' in s 84(1) of the

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Act; (ii) a declaration that an approved deed was not required for the plaintiffs to offer their services to the public; and (iii) a declaration that by offering the plaintiffs' services to the public without an approval deed, the plaintiffs did not contravene s 91 of the Act. The High Court held that: (i) the plaintiffs' business was not an 'interest' within the meaning of s 84(1)(a) because there was no profit available for the purchaser to participate; (ii) s 84(1)(b) was not available as there was no common enterprise whereby the plaintiffs and the purchasers were both involved to gain benefit; (iii) s 84(1)(c) was not applicable as the plaintiffs' business was not a time-sharing scheme; and (iv) the standard agreements were not investment contracts as they did not contemplate pecuniary return to the purchasers. The Court of Appeal allowed the defendant/respondent's appeal and held that: (i) the word interest should be given a wide meaning; (ii) for s 84(1)(a), it was not necessary to show that the plaintiffs' business attracted any profit to which the purchasers may participate; (iii) the profit element need not be considered in deciding whether the respondents' enterprise fell under s 84(1)(b) meaning of interest; and (iv) the standard agreements between the plaintiffs and the purchasers did not provide an outright sale of the burial plots or urn compartments. The plaintiffs obtained leave to appeal to the Federal Court on the question whether the plaintiffs' business fell within the meaning of s 84 of the Act.

Held, dismissing the appeal with costs:

(1) (per **Richard Malanjum CJ (Sabah and Sarawak)**) Although the defendant had conceded in the court below that the scheme was not an 'investment contract', the court nevertheless retained the residual power to rule that the scheme came within the term 'investment contract'. No court is bound to decide a controversy upon an erroneous concession of law made by one of the disputants before it, more so when a question of statutory interpretation is involved (see paras 15–16).

(2) (per **Hashim Yusoff FCJ**) On the facts, the appellant's business was not affected by even giving a wide interpretation to the term 'interest' under s 84 of the Act. A purchase of a burial plot or urn compartment together with the right to enjoy the common facilities with an up front payment of the maintenance charges is not a participation in the assets of a scheme but rather a simple purchase from the scheme. Hence, such a purchase was not caught by s 84(1)(a) of the Act (see paras 33 & 41).

(3) (per **Hashim Yusoff FCJ**) The mere usage of the common property does not constitute any 'common enterprise'. It would be unreasonable to say the purchaser expects profits, rent or interest from the promoter of such enterprise. There was no relationship between the purchasers of the burial plots and urn compartments amongst themselves and no 'common enterprise' to re-sell their plots and urn compartments collectively. There

was also no sharing of profits. Therefore, there was no 'common enterprise' as envisaged by s 84(1)(b) (see paras 42–43).

(4) (per **Hashim Yusoff FCJ**) The purchase of the burial plots or urn compartments was also not an 'investment contract'. It could not be said that the purchasers entered into a contract with a specific view to resell the burial plots or urn compartments (see para 45).

(5) (per **James Foong FCJ**) The burial plots or the urn compartments were only used when there were interments. The burial plots and storage spaces for urns involved the use of the lands in perpetuity. It was very unlikely that the graves on the burial plots sold would be exhumed or moved elsewhere. Therefore, the purchasers' participated in the assets of the plaintiffs was not for profits, but for benefits. So the presence of the necessary element of profits in the purchasers' participation, to qualify 'interest' in s 84(1)(a) was unacceptable. Thus, the 'interest' acquired by the purchasers fell within the statutory definition of s 84(1)(a) (see paras 81–82).

(6) (per **James Foong FCJ**) The plaintiffs and the purchasers did participate in a common enterprise. They were closely connected in the sense that the purchasers after making the initial payment were also required to pay for the maintenance charges. For this, they expected not only the burial lots and storage spaces for urns to be made available for each interment but also the facilities that went with it to be maintained properly. Thus, both parties had a mutual interest to ensure the success of this common enterprise. It is therefore wrong to say that the transaction between the purchasers and the plaintiffs was a one-of transaction (see para 87).

(7) (per **James Foong FCJ**) Aside from 'profits' under s 84(1)(b) of the Act, there were also 'rent' or 'interest' from the efforts of the promoters of the enterprise. The purchasers were led to an 'interest' from the efforts of the promoters of the enterprise. 'Interest' here were the benefits derived by the purchasers in securing the burial plots or urns compartments and the continuous maintenance of these with other facilities provided in the parks. With this element of 'interest' present, the plaintiffs' objection to the inclusion of s 84(1)(b) to their project failed (see para 90).

[Bahasa Malaysia summary

Plaintif-plaintif terlibat dalam perniagaan memperuntukkan lot-lot pengebumian dan petak-petak penyimpanan bekas simpan abu mayat yang dibakar di kawasan pengebumian yang dibina oleh plaintif-plaintif. Untuk mendapatkan lot pengebumian atau petak penyimpanan bekas penyimpanan abu mayat di kawasan pengebumian tersebut, pembeli-pembeli harus menyempurnakan satu kontrak standard untuk membeli lesen lot pengebumian atau tempat penyimpanan bekas abu mayat. Penjual atau pemegang amanah yang dilantik harus menyelenggara lot tersebut dan juga

keseluruhan pembangunannya. Setelah kawasan tersebut telah dibangunkan sepenuhnya, penjual kemudiannya akan memindahmilik kawasan tersebut termasuklah lot-lot pengebumian tersebut kepada pemegang amanahnya untuk dipegang bagi pihak pembeli-pembeli. Pembeli-pembeli boleh memindahmilik hak mereka terhadap lot-lot pengebumian masing-masing, jika pada masa pindah milik tiada pengebumian telah dijalankan ke atas lot tersebut. Syarat-syarat yang sama terpakai ke atas tempat menyimpan bekas abu mayat. Seksyen 91(1) Akta Syarikat 1965 ('Akta') memperuntukkan bahawa seseorang tidak boleh mengeluarkan atau menawarkan kepada orang ramai untuk yuran atau pembelian atau mempelawa orang ramai untuk yuran atau pembelian apa-apa kepentingan kecuali pada masa pengeluaran, tawaran atau pelawaan, adanya suratcara yang telah dibenarkan berkuatkuasa berkaitan kepentingan tersebut. Tidak pasti sama ada keperluan-keperluan Akta terpakai kepada mereka, plaintif-plaintif memohon ke Mahkamah Tinggi untuk: (i) perisytiharan bahawa perniagaan plaintif-plaintif tidak termasuk dalam maksud 'kepentingan' dalam s 84(1) Akta, (ii) perisytiharan bahawa suratcara yang telah dibenarkan tidak diperlukan bagi plaintif-plaintif untuk menawarkan khidmat mereka kepada orang ramai; dan (iii) perisytiharan bahawa dengan menawarkan perkhidmatan plaintif-plaintif kepada orang ramai tanpa suratcara yang telah dibenarkan, plaintif-plaintif tidak melanggar s 91 Akta. Mahkamah Tinggi memutuskan bahawa: (i) perniagaan plaintif-plaintif bukanlah 'kepentingan' dalam maksud s 84(1)(a) kerana tiada keuntungan kepada pembeli; (ii) s 84(1)(b) tidak terpakai kerana tiada perusahaan bersama di mana plaintif-plaintif dan pembeli-pembeli terlibat untuk mendapatkan keuntungan; (iii) s 84(1)(c) tidak terpakai kerana perniagaan plaintif-plaintif bukanlah skim kongsi masa; dan (iv) perjanjian-perjanjian standard bukannya kontrak pelaburan kerana perjanjian-perjanjian tersebut tidak menyatakan pulangan kewangan kepada pembeli-pembeli. Mahkamah Rayuan membenarkan rayuan defendan/responden dan memutuskan bahawa: (i) perkataan kepentingan harus diberikan maksud yang lebih luas; (ii) bagi s 84(1)(a), tidak perlu untuk menunjukkan bahawa perusahaan plaintif-plaintif membawa keuntungan yang mana memungkinkan penglibatan pembeli-pembeli; (iii) elemen keuntungan tidak perlu dipertimbangkan dalam memutuskan sama ada perniagaan responden-responden bermaksud kepentingan dalam s 84(1)(b); dan (iv) perjanjian-perjanjian standard antara plaintif-plaintif dan pembeli-pembeli tidak memperuntukkan penjualan tanpa syarat lot-lot pengebumian atau tempat penyimpanan bekas abu mayat. Plaintif-plaintif memperoleh kebenaran untuk merayu ke Mahkamah Persekutuan atas persoalan sama ada perniagaan plaintif-plaintif tertakluk dalam maksud s 84 Akta.

Diputuskan, menolak rayuan dengan kos:

(1) (oleh **Richard Malanjum (KH Sabah dan Sarawak)**) Walaupun

defendan telah mengaku di Mahkamah Rayuan bahawa skim tersebut bukanlah 'kontrak pelaburan', namun mahkamah mengekalkan kuasa baki untuk memutuskan bahawa skim tersebut terangkum dalam terma 'kontrak pelaburan'. Tiada mahkamah terikat untuk memutuskan suatu kontroversi atas konsesi undang-undang yang salah yang telah dibuat oleh salah seorang pihak yang bertikai, lebih-lebih lagi apabila melibatkan persoalan tafsiran statutori (lihat perenggan 15–16).

(2) (oleh **Hashim Yusoff HMP**) Daripada fakta-fakta, perniagaan perayu-perayu tidak terjejas walaupun dengan memberi tafsiran meluas kepada terma 'kepentingan' di bawah s 84 Akta. Pembelian lot pengebumian atau tempat penyimpanan bekas abu mayat bersama dengan hak untuk menikmati kemudahan-kemudahan dengan bayaran muka bagi penyelenggaraan bukanlah penglibatan kepada skim aset-aset tetapi pembelian ringkas daripada skim itu. Maka, pembelian tersebut tidak terangkum dalam s 84(1)(a) Akta (lihat perenggan 33 & 41).

(3) (oleh **Hashim Yusoff HMP**) Penggunaan harta bersama semata-mata tidak menjadikan 'common enterprise'. Adalah tidak wajar untuk menyatakan bahawa pembeli-pembeli menjangkakan keuntungan, sewa atau kepentingan daripada promoter perniagaan tersebut. Tiada hubungan antara pembeli-pembeli lot-lot pengebumian dan tempat penyimpanan bekas abu mayat dan tiada 'common enterprise' untuk menjual semula lot-lot mereka dan tempat penyimpanan bekas abu mayat secara kolektifnya. Juga tiada perkongsian keuntungan. Oleh itu, tiada 'common enterprise' seperti yang dinyatakan dalam s 84(1)(b) (lihat perenggan 42–43).

(4) (oleh **Hashim Yusoff HMP**) Pembelian lot-lot pengebumian atau tempat penyimpanan bekas abu mayat juga bukanlah 'kontrak pelaburan'. Tidaklah boleh dikatakan bahawa pembeli-pembeli tersebut menandatangani suatu kontrak dengan niat spesifik untuk menjual semula lot-lot pengebumian atau tempat penyimpanan bekas abu mayat (lihat perenggan 45).

(5) (oleh **James Foong HMP**) Lot-lot pengebumian atau tempat-tempat penyimpanan bekas abu mayat hanya digunakan apabila terdapat pengebumian. Lot-lot pengebumian dan tempat-tempat penyimpanan bekas abu mayat melibatkan penggunaan tanah-tanah untuk selama-lamanya. Adalah tidak mungkin bahawa kubur-kubur di lot-lot pengebumian tersebut yang dijual akan dikorek semula atau dipindahkan ke tempat lain. Oleh itu, penglibatan pembeli-pembeli dalam aset-aset plaintif-plaintif bukanlah untuk keuntungan tetapi untuk manfaat. Oleh itu, kewujudan elemen yang perlu iaitu keuntungan dalam penglibatan pembeli-pembeli, untuk melayakkan 'kepentingan' dalam s 84(1)(a) tidak boleh diterima. Oleh itu,

'kepentingan' yang diperolehi pembeli-pembeli terangkum dalam definisi statutori s 84(1)(a) (lihat perenggan 81–82).

(6) (oleh **James Foong HMP**) Plaintif-plaintif dan pembeli-pembeli terlibat dalam perusahaan yang sama. Mereka berhubungan rapat di mana pembeli-pembeli selepas membuat bayaran permulaan juga diperlukan membayar caj penyelengaraan. Untuk ini, mereka bukan sahaja diperuntukkan dengan lot-lot pengebumian dan tempat penyimpanan bekas abu mayat bagi setiap pengebumian malah juga kemudahan-kemudahan yang diperlukan untuk menyelenggara. Oleh itu, kedua-dua pihak mempunyai kepentingan bersama untuk memastikan kejayaan perusahaan bersama ini. Maka adalah salah untuk menyatakan bahawa urusan antara pembeli-pembeli dan plaintif-plaintif merupakan urusan sekali sahaja (lihat perenggan 87).

(7) (oleh **James Foong HMP**) Selain daripada 'keuntungan' di bawah s 84(1)(b) Akta, juga ada 'sewa' atau 'kepentingan' daripada usaha-usaha mempromosikan perniagaan tersebut. Pembeli-pembeli ditawarkan kepada 'kepentingan' hasil usaha promoter perniagaan tersebut. 'Kepentingan' di sini bermaksud faedah-faedah yang didapati oleh pembeli-pembeli dalam mendapatkan lot-lot pengebumian atau tempat penyimpanan bekas abu mayat dan juga penyelenggaraan berterusan bersama dengan kemudahan-kemudahan lain yang disediakan di kawasan tersebut. Dengan adanya elemen 'kepentingan', bantahan plaintif-plaintif terhadap pemasukan s 84(1)(b) kepada projek mereka adalah gagal (lihat perenggan 90).]

Notes

For a case on offer to purchase 'interest' in company, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 108.

For a case on purchase of business generally, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 599.

Cases referred to

Applewood Pty Ltd v Dadinbridge Pty Ltd & Ors (1983) 7 ACLR 535, SC (refd)

Australian Softwood Forests Pty Ltd & Ors v Attorney-General (NSW); Ex rel Corporate Affairs Commission (1981) 36 ALR 257, HC (folld)

Brisbane Unit Development Corp Pty Ltd v Deming No 456 Pty Ltd & Ors (1982) 7 ACLR 265, SC (folld)

Brisbane Unit Development Corp Pty Ltd v Deming No 456 Pty Ltd & Ors (1983) 7 ACLR 729, SC (refd)

Butterworth & Anor v Lezemo Pty Ltd & Anor (1983) 8 ACLR 737, SC (refd)

Chan Chin Ming & Anor v Lim Yok Eng [1994] 3 MLJ 233, SC (refd)

Hamilton v Casnot Pty Ltd (1981) 5 ACLR 279, SC (refd)

Maunder-Hartigan v Hamilton (1984) 8 ACLR 937, SC (refd)

Money Lending Firm of PMN, The & Anor v Syed Alsagoff 7 FMSLR 93 (refd)

NV Multi Corp Bhd & Ors v Suruhanjaya Syarikat Malaysia [2005] 6 MLJ 65, HC (refd)
Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 3 MLJ 72, FC (refd)
R v Commons (1986) 10 ACLR 873, CA (refd)
Ratus Mesra Sdn Bhd v Shaikh Osman Majid & Ors [1999] 3 MLJ 529; [1999] 8 CLJ 499, HC (refd)
Streeter v Pacific-Seven Pty Ltd (1985) 9 ACLR 790, SC (folld)
Suruhanjaya Syarikat Malaysia v NV Multi Corp Bhd & Ors [2008] 5 MLJ 61, CA (refd)
Temenggong Securities Ltd & Anor v Registrar of Title, Johore & Ors [1974] 2 MLJ 45, FC (refd)
Wade v A Home Away Pty Ltd (1981) VR 475, SC (refd)
Waldon v MG Securities A/Asia Ltd (1975) VR 508, SC (refd)

Legislation referred to

Companies Act 1965 ss 7B, 9(1), 84, 84(1), (1)(a), (b), (c), (d), 85, 86, 87, 88, 89, 90, 91, 91(1), 92, 93, 94, 95, 97, Part IV, Division 5
Companies Act [AU] s 76, 76(1)
National Land Code s 206(3)

Appeal from: Civil Appeal Nos W-01–41 of 2005 and W-02–523 of 2006 (Court of Appeal, Putrajaya)

Vijay Kumar Natarajan (Karen Wildred with him) (Mazlan & Associates) for the appellant.
Tommy Thomas (Azmi bin Arifin, Muhammad Redzuan bin Abdullah, Mohamed Sufyan bin Mohd Mokhtar and Muhamad Faris bin Othman with him) (Senior Federal Counsel, Companies Commission of Malaysia) for the respondents.

Richard Malanjum CJ (Sabah and Sarawak):

[1] I have had the advantage of reading in drafts both the judgments of my learned brothers, Hashim Yusoff FCJ and James Foong FCJ. I am inclined to agree with the reasons and conclusion arrived at by the latter. Hence I need only to add a short judgment in support of his conclusion.

[2] The facts of this appeal have been well rehearsed in both the judgments. Repeating them here would serve no purpose.

[3] The question for consideration reads: A

> Whether the business of the appellants as Memorial Park operators which consists of, inter alia, the sale of burial plots and urn compartments fall within the meaning of s 84 of Part IV Division 5 of the Companies Act 1965 thereby requiring compliance with the provisions therein. B

[4] Simply put the question seeks for the proper interpretation of the word 'interest' as found in s 84 of the Companies Act 1965 ('the Act'). It is necessary in view of its implications in relation to compliance with and the enforcement of certain other provisions in the Act such as ss 89, 90, 91 and 94 thereof. C

[5] It is the basic contention of the appellants that the nature of scheme they are carrying out does not come within the intended meaning of the word 'interest' in s 84 simply because their customers do not buy interest in the assets of the scheme but rather a simple purchase from the scheme. As such ss 90 or 91 of the Act has no application. D

[6] The respondent argued otherwise. It was submitted that the mischief addressed by s 91 of the Act is to protect members of the public when purchasing assets in a scheme such as that of the appellants. And the requirement thereof is not an absolute prohibition but only subject to regulations and approval from the relevant authorities. E

[7] Specifically, in respect of the scheme of the appellant it was contended that compliance with the relevant sections of the Act would allow the proper authorities to regulate and oversee the management of the 'continuity fees' (which is in fact maintenance funds by another name) collected by the appellants in advance from their customers. F

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[8] Having reviewed the existing judicial authorities my learned brother James Foong FCJ supports the position taken by the respondent. He agrees that in the interest of the public the management of the continuity fees collected in advance should be regulated. I fully concur. It should be done so through the applications of the relevant sections of the Act. And that can only be done if the word 'interest' in s 84 is given a meaning reflective of the mischief it is intended to address. H

[9] And in addition to the reasons given, I hasten to say that contrary to the submission of learned counsel for the appellants and the apparent concession in the court below I think the word 'interest' in s 84 could also be interpreted to mean 'investment contract' as defined in the Act. I

[10] Section 84 reads:

> 84 Interpretation
>
> (1) In this Division and in the Seventh Schedule, unless inconsistent with the context or subject matter —
>
> 'interest' means any right to participate or interest, whether enforceable or not and whether actual, prospective or contingent —
>
> (a) in any profits, assets or realization of any financial or business undertaking or scheme, whether in Malaysia or elsewhere;
>
> (b) in any common enterprise, whether in Malaysia or elsewhere, in which the holder of the right or interest is led to expect profits, rent or interest from the efforts of the promoter of the enterprise or a third party;
>
> (c) in any time-sharing scheme; or
>
> (d) *in any investment contract*, (Emphasis added.)
>
> whether or not the right or interest is evidenced by a formal document and whether or not the right or interest relates to a physical asset, but does not include —
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> (e) …
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> (f) …
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> (g) …
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> (i) …
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> (ii) …
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> (h) …
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> 'investment contract' means any contract, scheme or arrangement which in substance and irrespective of the form thereof involves the investment of money in or under such circumstances that the investor acquires or may acquire an interest in or right in respect of property which under or in accordance with the terms of investment will, or may at the option of the investor, be used or employed in common with any other interest in or right in respect of property acquired in or under like circumstances and includes any contract, scheme or arrangement which in substance and irrespective of the form thereof entitles the investor to a right to use or enjoy any sport, recreational, holiday or other related facilities for a consideration and for a duration of not less than twelve months whether or not on a recurring basis.

[11] On plain reading of the meaning assigned to the term 'investment contract' and bearing in mind the facts as given in the working of the scheme of the appellants it is clear that the scheme comes within the term.

[12] Firstly there is no question of the investment being less than 12 months.

[13] Secondly, it is clear that when a buyer makes a purchase which may consist of urn compartment or a burial plot he invests money. He thus acquires a separate interest in or right in respect of such property. And it may then be used, under or in accordance with the terms of investment or at his option, in common with any other interest in or right in respect of property acquired in or under like circumstances. Whether it is a purchase in or from the scheme is therefore quite irrelevant.

[14] And having arrived at such a view I would say that certain relevant provisions of the Act therefore need to be complied with. It is not in dispute that through the issuance of prospectuses without any approved deed members of the public are offered and invited to subscribe to such 'interest' in the scheme thus may be in contravention of s 91. Further, the question of limiting the application of that section to individual persons or extending it to all persons does not arise. The respondent has made it quite clear that the focus is on public companies like the appellants.

[15] The next point is whether this court should be allowed to embark along this line of approach in view of the concession by the respondent in the court below that the scheme is not an 'investment contract'.

[16] My view is that notwithstanding the concession this court retains the residual power to rule as I do now in the interest of justice. It has been said that no court is bound to decide a controversy upon an erroneous concession of law made by one of the disputants before it, more so when a question of statutory interpretation is involved. The most odd of results would follow if a contrary rule is to be applied. As Thorne J observed in *The Money Lending Firm of PMN & Anor v Syed Alsagoff* 7 FMSLR 93 at p 120:

> (T)his court should disregard the admission (of counsel) on the grounds that it was an erroneous statement of law no more binding or authoritative than many other bizarre propositions of law to which courts have to listen.

(See *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72).

[17] And in *Chan Chin Ming & Anor v Lim Yok Eng* [1994] 3 MLJ 233 this is what the majority of the then Supreme Court had to say on a concession point:

> What was conceded about the multiplier being 16 years' purchase, in the court below, appears clearly to amount to an admission on a point of law. However, on a point of law, a court is not precluded from deciding on the rights of the parties on a true view of the law, and the admission is not binding on it. See *Societie Banque v Girdhari* AIR 1940 PC 90. Such surprising submission of the defendants could then be considered on its merits.

[18] Accordingly for the added reason above the question posed should be answered in the affirmative. I would therefore dismiss this appeal with costs.

Hashim Yusoff FCJ:

[19] The appellants were granted leave to appeal on the following question:

> Whether the business of the appellants as memorial parks operators which consists of, inter alia, the sale of burial plots and urn compartments fall within the meaning of s 84 of Part IV Division 5 of the Companies Act 1965 thereby requiring compliance with the provisions therein.

BACKGROUND

[20] The appellants are primarily running the business of providing funeral services. This appeal concerns that part of the appellant's business relating to the sale of burial plots and urn compartments to the general public.

[21] The respondent is the Companies Commission of Malaysia ('CCM') which is responsible for the administration of the provisions of the Companies Act 1965 ('the Act').

[22] On 21 August 2001 the fourth appellant received from the respondent a notification to the effect that the appellant was offering for sale an interest in a memorial garden in Johor. It should be noted that the respondent acknowledges that there is no sale of any interest in the appellant's company but rather a sale of interest relating to the property. The letter went on to say that if what was stated was true, then the appellants had failed to comply with s 84 of the Act, and more particularly, to comply with Part IV, Division 5 of the Act.

[23] In response, the appellants contended that Division 5, Part IV of the Act was not applicable to their business. The respondent disagreed, and by letter dated 29 December 2001 insisted that the appellants comply, and to make the necessary application, failing which, action would be taken against them. The appellant's subsequent representation dated 18 February 2002 was also rejected by the respondent which maintained its stand that the appellant had to comply with Division 5, Part IV of the Act. Further correspondence and meetings between the appellant and respondent to resolve the matter also failed.

[24] On 10 February 2004 the respondent then pursuant to their powers to conduct inspection under s 7B of the Act, requested the appellants to furnish details and documents pertaining to their business which the appellants

complied with. Here again it should be noted that the respondent did not see it fit to request for copies of the trust deeds entered into between the appellant and the trustees.

[25] On 25 May 2004 the appellants filed an originating summons in the Kuala Lumpur High Court against the respondent, praying for the following reliefs:

(a) A declaration that the appellant's business as follows:

(i) in consideration of the customers making the agreed payment to the appellants, the appellants permit the customers to use the cemetery land prepared and developed by the appellants for burial, subject to the terms of agreement between the appellants and the customers;

(ii) in consideration of the customer making the agreed payment to the appellants, the appellants permit the customers to use the urn compartments prepared and developed by the appellants to keep ashes, subject to the terms of the agreement between the appellants and the customers (the business activities of the appellants in sub-para (a) and (b) above being collectively referred to as the 'services') is not within the meaning of 'interest' in s 84(1) of the Act.

(b) A declaration that an approved deed under Part IV, Division 5 of the Act is not required for the appellants to offer their services to the public; and

(c) A declaration that the appellants in carrying out their business by offering their services to the public without an approved deed under Part IV, Division 5 of the Act, have contravened s 91 of the Act.

[26] On 21 March 2005 the learned High Court judge granted the declarations prayed for. His Lordship's decision is reported in *NV Multi Corp Bhd & Ors v Suruhanjaya Syarikat Malaysia* [2005] 6 MLJ 65.

[27] On appeal by the respondent, the Court of Appeal on 13 June 2008 reversed the decision of the High Court and set aside the declarations granted by the High Court. Hence the appeal to this court, by the appellants.

THE BRIEF FACTS

[28] The facts are not in dispute and have been amply set out in the judgments of the High Court and the Court of Appeal. Basically it involves the sale of burial plots or urn compartments for a fixed sum and a further lump sum for maintenance is collected up-front. This maintenance fee is placed with trustees for up-keep and maintain the cemetery and the common facilities, the columbaria, worship halls and infrastructure. It is a fact that the appellants do not have an approved deed as contemplated under s 9(1) of the Act and neither has any prospectus pursuant to s 90 of the Act been issued.

Section 90 of the Act provides:

> (1) Before a company or an agent of a company issues or offers to the public for subscription or purchase or invites the public to subscribe for a purchase any interest, the company shall issue or cause to be issued a statement in writing in connection therewith, which statement shall for all purposes be deemed to be a prospectus issued by a company, and subject to subsection (2) all provisions of this Act relating to prospectuses or to the offering or to an intended offering of shares for subscription or purchase to the public shall, with such adaptations as are necessary, apply and have effect accordingly as if the interest were shares offered or intended to be offered to the public for subscription or purchase and as if persons accepting any offer or invitation in respect of or subscribing for or purchasing any such interest were subscribers for shares.
>
> (2) Subject to subsection (3) the statement shall set out —
>
> (a) the matters and reports specified in the Seventh Schedule; and
>
> (b) such other matters as are required by or under the regulations to be set out in the statement,
>
> which such adaptations as the circumstances of each case require and the Registrar approves.

Section 91 of the Act provides:

> (1) A person shall not issue or offer to the public for subscription or purchase or invite the public to subscribe for or purchase any interest unless, at the time of the issue, offer or invitation, there is in force, in relation to the interest, a deed that is an approved deed.
>
> (2) A person shall not in any deed, prospectus, statement, advertisement or other document relating to any interest make any reference to an approval of a deed or of a trustee or representative granted under this Division.

(3) Where —

(a) an interest issued by a corporation before the date of commencement of this Act is in existence immediately before that date;

(b) this Division would have applied in relation to the issue of the interest if the interest had been issued on or after that date;

(c) there is not, at the expiration of three months after that date, a deed that is an approved deed in force in relation to the interest; and

(d) the corporation did not, within a period of one month after that date, apply for approval under this Division of a deed in relation to the interest or, if it did so apply, approval was refused, the corporation shall, within fourteen days after the expiration of the period referred to in paragraph (c), give to the holder of the interest and to the Registrar notice in writing that there is not in force in relation to that interest a deed that is an approved deed and, if this subsection is not complied with, each director of the corporation shall, in addition to the corporation, be deemed to have failed to comply with this subsection.

(4) The Minister may modify the application to a corporation of subsection (3) by extending any period referred to in that subsection or may exempt any corporation from compliance with that subsection.

(5) Nothing in subsection (3) shall be construed as authorizing the Registrar to grant his approval to a deed that relates to an interest issued by a corporation that is not a company for the purposes of this Division.

WHAT IS A S 84 INTEREST

[29] The Court of Appeal was of the view that the sale of the burial plots and urn compartments was an 'interest' within the meaning of s 84 of the Act.

I agree with learned counsel for the respondent that the definition of 'interest' under s 84 is very wide as stated by Murphy J in the Australian High Court case of *Australian Softwood Forests Pty Ltd & Ors v Attorney-General (NSW); Ex rel Corporate Affairs Commission* (1981) 36 ALR 257 when His Honour stated:

> Division 5, Part IV of the Company's Act 1961 (NSW) as amended, prohibits a company from making issues or offers to the public for subscription or purchase or from inviting the public to subscribe for or purchase any interest, without first fulfilling certain statutory requirements designed to protect the public. These protective provisions apply whether the scheme is sound, foolish or fraudulent.
>
> The Legislature has defined 'interest' extremely widely, but to avoid any unintended effect has included specific exemptions and made provision for other exemptions by regulation …

[30] It is clear that the definition of 'interest' in the Act is wide enough to cover all schemes and should not be restricted. However, I disagree with the

finding that the learned High Court judge applied a restrictive or narrow meaning to the word 'interest'. My reading of the High Court judgment clearly shows that the High Court judge was of the opinion that a transaction did not fall within the meaning of 'participate in assets' when a purchaser purchases the asset of the business or undertaking. I agree with the learned High Court judge that in such a case the assets cease to be the asset of the business, undertaking or scheme. Learned counsel for the respondent has submitted that the appellants remain the registered proprietor under the National Land Code ('the NLC'), but has also conceded that the appellants have fully agreed to transfer the land to the trustees once the cemetery is fully developed. Furthermore our jurisprudence in land law recognises the equitable interest of purchasers. Contractual rights as accrued to the purchasers are recognised under s 206(3) of the NLC.

[31] In *Temenggong Securities Ltd & Anor v Registrar of Title, Johore & Ors* [1974] 2 MLJ 45, this court observed:

> The law is clear that the vendor after receipt of the full purchase price and surrender off possession of the lands (to the purchaser) are bare trustees for the (purchaser) of the said land and it must consequently follow, as night must (follow) day; that the vendors have no interest in the lands which can be the subject matter of a caveat.

[32] The trial judge had correctly held that the principles in *Applewood Pty Ltd v Dadinbridge Pty Ltd & Ors* (1983) 7 ACLR 535 and *Brisbane Unit Development Corp Pty Ltd v Deming No 456 Pty Ltd & Ors* (1982) 7 ACLR 265 are applicable as the purchasers acquire something which ceased to be an asset of that corporation.

[33] I am therefore of the view that whilst I accept the definition of 'interest' under s 84 of the Act is wide and that the court will give a wide interpretation to the meaning of 'interest' in line with the *Australian Softwood Forests* case, based on the facts of this case, the appellant's business is not affected by even giving a wide interpretation to the term 'interest' under s 84 of the Act.

SCOPE OF S 84(1)(A) AND (B)

[34] Learned counsel for the appellants has submitted that for paras (a) and (b) of s 84 of the Act to be applicable, it is not sufficient for there to be an acquisition of an asset from the scheme but there must be an acquisition of an interest in the scheme. He went on to illustrate that if purchasers were invited to participate by buying a plot which would be on-sold or re-marketed to the public by the appellants, then that would constitute a purchase of an asset in the scheme. However in the instant appeal, an outright purchase by the buyer, where the burial plot and urn compartment are reserved and are for the

exclusive use of the buyer, is a purchase of an asset from the scheme and is outside the scope of s 84(1)(a) of the Act.

[35] In order to fall within para (a) of the definition of 'interest' there must be a right to participate, of an interest, '*in* any profits, assets or realisation of any financial or business undertaking or scheme'.

I am also mindful of the finding of Connelly J in the case of *Brisbane Unit Development Corporation Pty Ltd v Deming No 456 Pty Ltd & Ors* (1983) 7 ACLR 729 wherein His Honour stated:

> As His Honor observed, the words in question are of very wide input. It is not, as I think, open to question that the promotion of a home unit building involving as it must the acquisition of the land, the design and construction of the building, the financing of the enterprise, the sale of the projected home units (usually in anticipation of their construction), the registration of the building units plan and the final step by the promoter of divesting itself of the building and its compartment units answers the description 'a financial or business undertaking or scheme'.

[36] The question however, is whether the invitation to the public to purchase an interest *in* the assets of the financial a business undertaking or scheme. Those who conduct such undertaking and schemes commonly hold property both real and personal. It is equally common for them to dispose of such assets from time to time. When a motorcar or a parcel of land surplus to the requirements of a trading corporation is sold, the purchaser does not in any judgment acquire an interest in an asset of the trading corporation. On the contrary, he acquires something which has ceased to be an asset of that corporation.

[37] The two cases to which we were referred in this connection were *Australian Softwood Forests* and *Wade v A Home Away Pty Ltd* (1981) VR 475. In both cases the public were invited to become participants in the undertaking or scheme. The court held that mere purchase of a home unit did not amount to a purchase of an interest in para (a) and added:

> Giving the phrase the wide import which is called for, there is, in my opinion, nothing about the ownership of a unit and a share in the common property which answers the description financial or business undertaking or scheme. True it is that the unit holders, though their elected body corporate, must take appropriate steps for the management and maintenance of the building but this does not amount to the conduct of 'a financial or business undertaking or scheme'.

The learned judge in the case also dealt with para (b) of s 84(1) of the Act as follows:

> Paragraph (b) can have no application. The only common enterprise in which the unit holders will be involved is the running of the buildings and there is no suggestion in this case of any expectation of profits, rent or interest from the efforts of the promoter or a third party. Nor do I think that it is right to say that any unit holder will require a right to participate or an interest in an investment contract.

[38] The observations of the Western Australian Supreme Court in *Maunder-Hartigan v Hamilton* (1984) 8 ACLR 937 (Wallace, Brisden and Pidgeon JJ presiding) are also relevant where it was held that a purchase despite the wide import to be given to the statute did not amount to a purchase of an interest *in* the company as envisaged by the legislation. The question posed was 'what has the owner acquired?' and 'is it an asset in the scheme?' The answer was, as somewhat similar in this case, the owner merely purchased and acquired an interest *in* the *land*. That interest is *not in the scheme*.

Brisden J succinctly summarised the position as follows:

> The mere purchase of a home unit under compensation legislation has been held not to answer to a prescribed interest under (a) of the definition: *Brisbane Unit Development Corp Pty Ltd v Deming No 456 Pty Ltd & Ors* [1983] 2 QD 92. The reason for that was as the court held, the purchaser did not purchase an asset in a business undertaking or scheme but rather an asset from a business undertaking or scheme.

[39] A scheme to develop a piece of land, involving the acquisition of land, financing the project, construction of the places of worship and columbarium and further sale of burial plots and urn compartments to other members of the public might well be 'financial business undertaking or scheme' within the meaning of s 84(1)(a) of the Act as was distinguished in *Brisbane Unit Development Corporation Pty Ltd v Deming No 456 Pty Ltd & Ors* [1983] 7 ACLR 729.

[40] But the sale simpliciter of burial plots and urn compartments in the manner carried out by the appellants will not be caught by the language of the legislation and I am unable to interpret the legislative provision as requiring the appellants to issue a prospectus or have an approved deed.

[41] As such, I am inclined to agree with learned counsel for the appellant that a purchase of a burial plot or urn compartment together with the right to enjoy the common facilities with an upfront payment of the maintenance charges is not a participation *in* the assets of a scheme but rather a simple purchase *from* the scheme. Hence, such a purchase is not caught by para (a) of s 84(1) of the Act.

[42] As regards para (b) of s 84(1) of the Act, the cases I have referred to

earlier made it clear that the mere usage of the common property does not constitute any 'common enterprise'. It would be unreasonable to say the purchaser expects profits, rent or interest from the promoter of such enterprise. In the instant appeal, the purchaser buys the burial plot or urn compartments. Even assuming the purchaser is minded to divest himself of his rights at a profit, the same would be as a consequence of his investment and not as a consequence of the promoter's efforts.

[43] There is no relationship between the purchasers of the burial plots and urn compartments amongst themselves and no 'common enterprise' to re-sell their plots and urn compartments collectively. There is also no sharing of profits. I cannot therefore say, based on these facts, that there exist a 'common enterprise' as envisaged under para (b) of s 84(1) of the Act.

[44] Furthermore in order to be caught under para (b) of s 84(1) of the Act, there must be an invitation to participate in a business *jointly* with the promoter as seen in *Hamilton v Casnot Pty Ltd* (1981) 5 ACLR 279. But if the purchaser merely gets to use the burial plot or urn compartment which is sold to him, or even if he transfers the plot or urn compartment at a profit made through the purchaser's own effort as in the case of *Butterworth & Anor v Lezemo Pty Ltd & Anor* (1983) 8 ACLR 737, the sale of the burial plot or urn compartment would not amount to a prescribed interest. I may be inclined to hold otherwise if there was in place a scheme whereby the appellants re-marketed and on-sold the burial plots or urn compartments on behalf of the purchasers and the profits were shared amongst them.

[45] Learned counsel for the respondent have conceded before the Court of Appeal that the appellants' business does not fall under para (d) of s 84(1) of the Act. It is therefore not open for them to raise it now. Even if the issue was raised, for the reasons given earlier, I am of the view that the purchase of the burial plots or urn compartments is not an 'investment contract'. It cannot be said that the purchasers entered into a contract with a specific view to resell the burial plots or urn compartments. There is no affidavit filed by the respondent to that effect to show that there is a business of investing burial plots and urn compartments for the purpose of selling them and not for the prima facie personal use.

MISCHIEF OF S 91 OF THE ACT

[46] Part IV of the Act relates to shares, debentures and charges and Division 5 prohibits a company from making offers to the public for purchase of any interest, as defined under s 84 without first fulfilling certain statutory requirements designed to protect the investing public. To my mind, it does not involve a pure commercial sale and purchase transaction. If this transaction is

deemed to be a sale of interest under the Act then all housing developers in Malaysia will also have to comply with the provisions of having to issue a prospectus and having an approved deed before offering their houses in the housing scheme for sale. I do not think that is the intention of the Legislature.

[47] The legislation seeks to protect investors in companies. All business enterprises are one form of scheme or the other. It is not the benefits of the scheme or the advantages under the scheme that the Act seeks to regulate. If there is no participation *in* the 'scheme', then the legislation is not applicable. The respondent in effect seems to be suggesting that if a purchaser buys a property from a developer, it is within the purview of the registrar to determine the quality of the home and the terms of the purchase. To my mind that is not the intention of the legislation or the effect of ss 90 and 91, read with s 84(1)(a) or (b) of the Act. I am of the opinion that once there is a purchase *from* the scheme, then to hold that a prospectus needs to be issued would be to subject practically all sales to the onerous requirement of a company having to issue a prospectus and needing to have an approved deed.

[48] The crucial distinction to be observed is that the appellants' business is basically a simple sale of burial plots and urn compartments and not an investment per se in the appellants' company or their business. I am of the view that the appellants' manner of conducting their sales of their product is not intended to be subject to these legislative provisions from a reading of the language used in the statute. It is observed that there is no affidavit in reply by the respondent, and no allegation whatsoever that the appellants are conducting their business in an undesirable manner.

[49] I also take judicial notice that traditionally funeral services for non-Muslims in Malaysia are more often than not, especially for the Chinese Buddhist and Taoists community, offered by various associations or 'kongsi'. These associations come under various umbrellas of benevolent associations or temples. Funeral plots and urns compartments are sold to the public who become 'members' and 'donations' collected. Basic maintenance is provided by the association from the monies collected. If such a sale is to be considered a sale of an 'interest' under the Act, then there will be a serious repercussion, as firstly, under s 89 of the Act, such associations will have to incorporate themselves as required under the said s 89, which provides:

89 Interest to be issued by companies only

No person except a company or an agent of a company authorized in that behalf under the seal of the company shall issue or offer to the public for subscription or purchase or shall invite the public to subscribe for or purchase any interest.

[50] Thereafter these 'kongsi' and associations would have to issue prospectuses and obtain approved deeds, failing which they would be subject to the penalties provided under s 94 of the Act, which include imprisonment up to five years and a fine up to RM100,000. I am of the view that if penal sanctions of this severity are intended to be imposed, the provisions of the statute have to be clear and unambiguous.

[51] For the reasons stated, I would answer the question posed in the negative in that the appellants' business of sale of burial plots and urn compartments does not fall within the ambit of s 84 of Part IV, Division 5 of the Act.

[52] I hereby allow this appeal with costs here and in the courts below. The decision of the Court of Appeal is set aside and the declarations granted by the High Court on 21 March 2005 are hereby affirmed.

James Foong FCJ:

[53] In order to fully appreciate the contents of this judgment, the facts are to be disclosed first followed by the issues and then the analysis of the law.

FACTS

[54] The first plaintiff is a public listed company. The rest of the plaintiffs are directly or indirectly owned by the first plaintiff.

[55] The plaintiffs are involved in the business of cemetery development by providing services to the public to acquire burial lots and compartments for storage of urns containing ashes of the cremated on lands developed by the plaintiffs. These lands developed by them are known as memorial parks. In these parks, aside from burial lots and columbaria structures for storage of urns there are also temples, chapels, rest and parking areas.

[56] To acquire a burial lot or an urn compartment in these parks, a purchaser is required to execute a standard form of contract. There is one for burial plot and another for urn storage. Aside from some minor variations, the terms and conditions for these purchases are virtually identical.

[57] The agreement commences with 'I agree to purchase the licence for the burial plot (or urn compartment) unidentified hereunder at the purchase price specified herein upon the terms …' Below this, are the particulars of the purchaser, the purchase price, maintenance fees and the burial plot or storage number of the urn compartment. On the following page are 14 conditions for burial plot and 12 for urn compartment. I shall highlight some in respect of burial plots.

> Condition 1: The burial plot is purchased free from all encumbrances and shall continue to do so.
>
> Condition 3: A certificate of purchase duly signed by or on behalf of the Vendor shall be issued as evidence of ownership of the burial lot. Such certificate will have to be produced whenever interment is required.
>
> Condition 4: In the event the burial lot herein is not available for interment for whatever reason, the Vendor will make available an alternative plot for the Purchaser similar to that purchased herein and the Purchaser shall not be entitled to any claim, compensation or damages whatsoever.
>
> Condition 6: The Purchaser may at any time in writing nominate a beneficiary for the plot and may from time to time revoke the nomination and appoint another person to be his beneficiary being the person for whom the plot is intended for interment. Where no person has been nominated the Purchaser shall be deemed to be the beneficiary of the plot.
>
> Condition 8: The plot shall be sold together with the right to the Purchaser in common with the Vendor and the purchasers of all other plot to use the roads, common areas and other facilities and amenities appurtenant to the enjoyment of the plot.
>
> Condition 9: The Vendor or its appointed trustee will maintain the plot and the entire development known as 'Nivana' in an orderly manner with requisite landscaping.
>
> Condition 10: After the land has been fully developed the Vendor will transfer the same including the plot subject to the sale and purchase herein to its trustee to be held by such trustee upon trust for the Purchaser in common with all purchasers having interests therein.
>
> Condition 13: The Purchaser is at liberty at any time to transfer his rights to the plot subject to the Purchaser furnishing the certificate of ownership and paying a fee that may be prescribed provided that at the time of transfer no interment shall have been effected on the plot.

[58] With regards to storage of urns the following are the pertinent variations:

> Condition 5: The Purchasers and his invitees shall have free and unhindered access to the compartment and the care park area and other areas designated for worship in common with other licencees and all persons having the same or similar rights.

Condition 8: The Vendor may at any time transfer the columbarium in which the compartment is comprised together with the land upon which the columbarium is erected to the Vendor's trustee to be held by such trustee upon trust for the Purchaser in common with all purchasers having interest therein after the land has been fully developed.

Condition 9: The Purchaser is at liberty to transfer his rights to the compartment subject to the Purchaser furnishing the certificate of purchase and paying a fee that may be prescribed provided that at the same time of transfer the compartment is vacant.

THE REQUIREMENT

[59] Section 91(1) of the Companies Act 1965 ('the Act') provides:

A person shall not issue or offer to the public for subscription or purchase or invite the public to subscribe for or purchase any *interest* unless at the time of the issue, offer or invitation, there is in force, in relation to the interest, a deed that is an approved deed. (Emphasis added.)

[60] Associated with the deed are:

[61] Sections 85–87 of the Act which state that the deed shall only be approved if: (a) the Companies Commission of Malaysia ('the defendant') grants the approval; and (b) the Minister on the recommendation of Bank Negara (Central Bank) has approved the trustee or representative to act as such.

[62] Section 88 of the Act demands minimum covenants to be included in an approved deed.

[63] Section 92 of the Act requires the management company to keep a register of the holders of interest under the approved deed.

[64] Section 93 of the Act insists that the management company shall annually lodge with the defendant returns and information relating to the holders interests.

[65] Section 95 of the Act says that where the management company is in liquidation or has failed to comply with the deed to the prejudice of holders of interests, the trustee or representative shall summon a meeting of the holders.

[66] Section 97 of the Act specifies that the trustee may be held liable for their actions or omissions.

[67] Then in s 94, the Act imposes an imprisonment of up to five years or a fine of RM100,000 for those who contravene the relevant provisions.

[68] Since the word 'interest' in s 91 of the Act is pertinent, s 84(1) of the Act provides an interpretation:

> 'Interest' means any right to participate or interest, whether enforceable or not and whether actual prospective or contingent —
>
> (a) in any profits assets or realization of any financial or business undertaking or scheme whether in Malaysia or elsewhere;
>
> (b) in any common enterprise whether in Malaysia or elsewhere in which the holder of the right or interest is led to expect profits rent or interest from the efforts of the promoter of the enterprise or a third party …
>
> (c) in any time-sharing scheme; or and
>
> (d) in any investment contract, whether or not the right or interest is evidenced by formal document and whether or not the right or interest relates to a physical asset, but does not include …
>
> (e) (not applicable to our case).
>
> (f) (not applicable to our case).
>
> (g) (not applicable to our case).
>
> (h) (not applicable to our case).

THE HIGH COURT

[69] Uncertain whether these requirements are applicable to them, the plaintiffs applied to the High Court at Kuala Lumpur for:

(a) a declaration that the plaintiffs' business is not within the meaning of 'interest' in s 84(1) of the Act;

(b) a declaration that an approved deed under Part IV, Division 5 of the Act is not required for the plaintiffs to offer their services to the public; and

(c) a declaration that by offering the plaintiffs' services to the public without an approval deed under Part IV, Division 5 of the Act, the plaintiffs do not contravene s 91 of the Act.

[70] The High Court after referring to various cases decided by the Australian's courts which has a similar provision to s 84 of the Act found:

> The plaintiffs' business is not an 'interest' within the meaning of limb (a) because there is no profit available for the purchaser to participate. The mere right to use the facilities developed by the plaintiffs is not a participation in the assets of the plaintiffs.

Limb (b) is not available because there is no common enterprise whereby the plaintiffs and the purchasers are both involved to gain benefit. In this respect, the purchasers do not contemplate any profit because the standard agreements do (not) have the term to guarantee profit or rent. Further, there is no subsequent transaction to be performed by the purchaser besides the purchase of the right to use the urn compartment as well as the burial plots as stipulated in the standard agreements.

Limb (c) is also not applicable because the plaintiffs' business is not understood to be the time-sharing scheme. There is no 'two or more period' in which the purchasers can occupy the property of the plaintiffs. The purchasers may use the urns compartments and burial plots allotted to them perpetually.

The standard agreements are not investment contracts because they do not contemplate pecuniary return to the purchasers.

[71] Dissatisfied with this decision, the defendant appealed to the Court of Appeal.

THE COURT OF APPEAL

[72] The Court of Appeal allowed the appeal and set aside the orders granted by the High Court. The judgment of this court is reported in *Suruhanjaya Syarikat Malaysia v NV Multi Corp Bhd & Ors* [2008] 5 MLJ 61.

[73] Insisting that the word interest should be given a wide meaning, the Court of Appeal found the interpretation adopted by the High Court too narrow and restrictive. For limb (a) of s 84(1) of the Act, the Court of Appeal felt that they 'do not think it is necessary for the purchasers to show that the respondents' (the plaintiffs') business attracts any profit to which they may participate. Profit and participating in it is but one limb of the ingredients stated in that definition section. In our view, the ingredients as stated in s 84(1) of the Act are to be disjunctively read'. Then it concluded by saying that under 's 84(1)(a), the ingredient of an 'interest in any asset of business undertaking or scheme' does not, in our view, carry with it the prospect to derive some profit by way of dividend'.

[74] In respect of limb (b) of s 84(1) of the Act, the Court of Appeal found the 'respondents' argument that there is no objective in the present case for depriving profits between the purchasers and the respondents also cannot be accepted. As earlier stated, the profit element need not be considered in deciding whether the respondents' enterprise fall under limb (b) meaning of interest'.

[75] It is also the opinion of the Court of Appeal that the standard agreements between the plaintiffs and the purchasers do not provide an outright sale of the burial plots or urn compartments as insisted upon by the

plaintiffs.

QUESTION POSED TO THE FEDERAL COURT

[76] Dissatisfied with the judgment of the Court of Appeal, the plaintiffs applied for leave to appeal to the Federal Court. Leave was granted on a sole question of law:

> Whether the business of the appellants (plaintiffs) as memorial park operators which consists of, inter alia, the sale of burial plots and urn compartments fall within the meaning of s 84 of Part IV Division 5 of the Companies Act 1965 thereby requiring compliance with the provisions therein.

ANALYSIS

[77] Except for one Malaysian authority: *Ratus Mesra Sdn Bhd v Shaikh Osman Majid & Ors* [1999] 3 MLJ 529; [1999] 8 CLJ 499, which is a libel action making some reference to s 84 of the Act in passing and of very little assistance to this case, there is a virtually no common law authority in this country on this important question of law that attempts to protect the public against possible losses in a free market enterprise. On the contrary, in Australia s 76(1) of the Australian Companies Act 1961 which is pari materia to our s 84(1) of the Act, has been deliberated in a variety of circumstances culminating in enlightening judgments on this point of the law. Thus, there is a tendency, as observed in the courts below, to borrow what has been decided in Australia for application here. While analogy can be illuminating, there is the danger that the decisions which are, after all mere examples, may induce the observer to believe that they define the limits of the scope of the definition — see Macrossan J comment in *R v Commons* (1986) 10 ACLR 873 at p 876. Bearing this in mind, I shall try not to be influenced by any preconception as to the intended policy behind statutory provision but to look to the words of the provision itself to ascertain the meaning.

[78] It is common ground that the word 'interest' in s 84(1) of the Act be given a wide meaning. The rationale is found in the judgment of Mason J in the Australian case of *Australian Softwood Forests Pty Ltd & Ors v Attorney-General (NSW); Ex rel Corporate Affairs Commission* (1981) 36 ALR 257:

> That a very wide meaning should be given to 'interest' is attested by the exclusion from the statutory definition of shares and debentures (para (d)), interests in life insurance policies (para (e) and, subject to some qualification, interests in partnership agreements (para (f)). The presence of the power to exempt by regulation other rights of interests from the

definition (para (g)) is also of telling significance.

LIMB (A) OF S 84(1) OF THE ACT

[79] With regards to limb (a) of s 84(1) of the Act, the plaintiffs argued before us that purchasers who entered into the standard agreements with them do 'not enter into contracts that give rise to a right to participate in the profits of the appellants' (plaintiffs') business undertaking or scheme or the right to participate in the assets of the appellants' business undertaking or scheme'. There is no financial gain or expectation of a dividend for the purchase. They are not entitled to a share or interest in the business or to take part in the profits earned by the plaintiffs from the sale of the burial plots and compartments to keep the urn. Tackling with the word 'assets' included in limb (a) of s 84(1) of the Act, the plaintiffs maintained that these purchasers would not receive any financial gain from the plaintiffs. In support, the Australian case of *Butterworth & Anor v Lezemo Pty Ltd & Anor* (1983) 8 ACLR 737 was cited.

[80] Limb (a) of s 84(1) of the Act reads:

> 'interest' means any right to participate or interest, whether enforceable or not and whether actual prospective or contingent in any profits assets or realization of any financial or business undertaking or scheme whether in Malaysia or elsewhere …

[81] Naturally, to decide on this, we must first ask ourselves whether there is a 'financial or business undertaking or scheme'; like the approach undertaken by Mason J in *Australian Softwood Forests Pty Ltd & Ors v Attorney-General (NSW); Ex rel Corporate Affairs Commission*. But what constitutes 'financial or business undertaking'? Jenkinson J in the Australian case of *Wade v A Home Away Pty Ltd* (1981) VR 475 at p 492 is of the view that it should be a commercial enterprise in a systematic and regular way with a view of a profit. As for 'scheme' Mason J in *Softwood Forest v AG* defines it as 'some programme, or plan of action … There is nothing in the notion of an undertaking or scheme that requires or implies that there is joint participation in everything comprised in the plan or that there must be a share or pooling of profit or receipts'. I am of the view that though the objective of a financial or business undertaking is profit, scheme on the other hand may not necessarily require the presence of this element. But one may argue that the preceding words include the mention of 'profits'. Indeed it is so but the next word that follows is 'assets' which must be read disjunctively from the word 'profits'. Participating in assets may not necessarily involve profit; benefit, perhaps. So there is no necessity that profits must be present in a scheme to qualify under limb (a) of s 84(1) of the Act. This brings me to the next argument of the plaintiffs which stresses on the non-participation of the purchasers in the assets of the plaintiffs.

[82] The plaintiffs have argued that the 'participation' in assets of an undertaking or scheme only extend to mere use of such assets and not owning them. Participation according to them involves something more than mere use. The Australian case of *Streeter v Pacific-Seven Pty Ltd* (1985) 9 ACLR 790 was cited in support of this proposition. I do not dispute this. In this instance, the burial plots or the urn compartments are only used when there are interments. Perhaps, it is this reason that the plaintiffs use the word 'licence' instead of an outright sale in the standard agreements. But if one were to examine the terms and conditions of the standard form agreements and considering the nature that they are burial plots, and storage spaces for urns, these involve the use of the lands in perpetuity. It is very unlikely that the graves on the burial plots sold would be exhumed or moved elsewhere. The permanency of these remaining on the lands must be the foremost consideration of the plaintiffs and the purchasers when they entered into the standard form agreements. In fact this is reflected in the agreements itself with the appointment of a trustee to operate the parks once they are fully developed. This is a clear indication of the purchasers' participation in the assets of the plaintiffs, not for profits, perhaps, as I have said, but for benefits. So the presence of the necessary element of profits in the purchasers' participation, which the plaintiffs laid great stress on to qualify 'interest' in limb (a) of s 84(1) of the Act, is unacceptable.

[83] For reasons aforesaid, it is my opinion that the 'interest' acquired by the purchasers of the standard form agreements fall within the statutory definition of limb (a) of s 84(1) of the Act.

LIMB (B) OF S 84(1) OF THE ACT

[84] Though it is not necessary for me to examine limb (b) of s 84(1) of the Act in the light of my conclusion in connection with limb (a), I shall do so for completeness and the fact that both parties have submitted extensively on it.

[85] Limb (b) of s 84(1) of the Act specifies:

> 'Interest' means any right to participate or interest, whether enforceable or not and whether actual prospective or contingent in any common enterprise whether in Malaysia or elsewhere in which the holder of the right or interest is led to expect profits rent or interest from the efforts of the promoters of the enterprise of a third party …

[86] So the first question one has to address in respect of this limb is whether the purchasers had acquired a right to participate in any common enterprise and secondly, whether it was one in respect of which they were led to expect profits, rent or interest from the efforts of the plaintiffs.

[87] The first pertinent factor we have to deal with here is 'common enterprise'. This term has been defined by Mason J in the *Australian Softwood Forest* case as:

> The argument is that in order to constitute a 'common enterprise' there must be a joint participation in all the elements and activities that constitute the enterprise. I do not agree. An enterprise may be described as common if its consists of two or more closely connected operations, on the footing that one part is to be carried out by A and other by B, each deriving separate profit from what he does, even though that the two operations constituting the enterprise contribute to the overall purpose that unites them. There is then an enterprise common to both participants and, accordingly, a common enterprise.

[88] The plaintiffs argued that the contracts they entered into with the purchasers are not for a common enterprise. There is no participation by the purchasers and that each burial plot purchased ceases to be an asset of the plaintiffs.

[89] I disagree with this contention. In my opinion the plaintiffs and the purchasers did participate in a common enterprise. They are closely connected in the sense that the purchasers after making the initial payment are also required to pay for the maintenance charges. For this, they expect not only the burial lots and storage spaces for urns to be made available for each interment but also the facilities that go with it to be maintained properly. Many of these purchasers are anticipated to return from time to time to pay their respects to those buried in the purchased burial plots or at the columbarium where the urns are kept and they expect these and other facilities provided in the parks to be well kept at all times. The higher standard of maintenance in these parks developed by the plaintiffs as compared to those operated by the authorities also provide comfort to the purchasers knowing that the dead buried or whose ashes are stored there are securely guarded in a clean, pleasant and well maintained environment. In fact, this forms part of the plaintiffs' undertaking under the standard form agreements. Memorial parks that are safe, orderly and well maintained are attractive to the public. Thus, under these circumstances, both parties have a mutual interest to ensure the success of this common enterprise. It is therefore wrong to say that the transaction between the purchasers and the plaintiffs is a one-of transaction. The efforts of the plaintiffs are of a continuing nature and do not stop at the sale of the burial plots or spaces in the columbarium. They continue thereafter with the purchasers paying for the up-keeps and maintenance costs. This continuing efforts of the plaintiffs as promoters are an integral factor to the success of this common enterprise.

[90] The next question that follows is whether the common enterprise is one which the purchasers were led to expect profits, rent or interest from the efforts

of the plaintiffs. In the *Australian Softwood Forest* case Mason J only refers to the common enterprise with each party deriving a separate profit from what it does. 'Profit' has been defined in an Australian case of *Waldon v MG Securities A/Asia Ltd* (1975) VR 508 at p 529 which deals with s 76 of the Australian Companies Act 1961:

> One of the definitions of 'profit' given in the *Oxford English Dictionary* is 'that which is deprived from or produced by some source of revenue'. *Webster* defines it as 'income of invested property — it includes any benefit or advantage accruing from the management use or sale of property or from the conduct of business', Dr Johnson defines it as 'Gain-pecuniary advantage'. It is in this sense that the word should be construed in this definition.

[91] Subsequent Australian authorities dealing with this limb (*Hamilton v Casnot Pty Ltd* (1981) 5 ACLR 279 and *Butterworth & Anor v Lezemo Pty Ltd & Anor*) have also ruled that the common enterprise in which the purchasers participated in will lead to expect profits. But the Court of Appeal in this instant case disagrees with this limitation. The Court of Appeal in fact states that 'the profit element need not be considered in deciding whether the respondents' (plaintiffs') enterprise fall(s) under limb (b) meaning of 'interest'. Then the Court of Appeal went on to say: 'Interest' here must as we have earlier stated, be given a wide ordinary meaning to mean 'a benefit, advantage or share' and not confined to merely a financial gain, yield, profit or dividend.'

[92] I cannot subscribe to this wide interpretation by the Court of Appeal with the inclusion of factors that are not even specified in s 84(1) of the Act. Firstly, the word 'interest' must be interpreted as defined in s 84(1) of the Act. No new elements should be added to what is stated in this provision. Secondly, the profit element cannot be totally excluded from this limb. It is, but one of the factors necessary to justify the fulfillment of this limb. Aside from 'profits' under this limb there are also 'rent' or 'interest' from the efforts of the promoters of the enterprise of a third party. In the factual matrix of this case, I would consider the purchasers were led to an 'interest' from the efforts of the promoters of the enterprise. 'Interest' in this case would be the benefits derived by the purchasers in securing the burial plots or storage spaces for the urns and the continuous maintenance of these together and other facilities provided in the parks. With this element of 'interest' present, the plaintiffs' objection to the inclusion of this limb of s 84(1) of the Act to their project must fail.

LIMB (C) AND (D) OF S 84(1) OF THE ACT

[93] Since the defendant has conceded that these two limbs are not

applicable to this case, I shall not proceed to deliberate them.

CONCLUSION

[94] For reasons aforesaid, I dismiss this appeal with costs and the deposit for this appeal to the defendant towards account of costs. The orders of the Court of Appeal are hereby affirmed.

Appeal dismissed with costs.

Reported by Kanesh Sundrum